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No. 99-1570

IN THE
Supreme Court of the United States

BAYER CORPORATION,

Petitioner,

v.

HOOVER COLOR CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its petition for certiorari, Bayer Corporation ("Bayer") demonstrated that the Fourth Circuit improperly reversed the district court's grant of Bayer's motion for summary judgment on the Section 2(b) meeting competition defense when it adopted two erroneous legal principles that led the court to identify claimed fact disputes. First, the Fourth Circuit concluded that the meeting competition defense should apply only if the seller can show that it extended the challenged price in order to match an individual competitor's specific price. In doing so, the court appears to exclude from the defense any prices extended pursuant to discount price schedules established in light of known competitive offers and revisited from time to time based on available market information. Second, the Fourth Circuit concluded that summary judgment is rarely available under Section 2(b) because the defense depends on the seller's intent and, in particular, that summary judgment was inappropriate here notwithstanding proof of Bayer's good faith intent to meet competition and the absence of any significant probative evidence to the contrary.

Hoover Color Corporation ("Hoover") ignores these two critical legal errors, repeatedly asserting instead that the Fourth Circuit simply disagreed with the district court on the existence of a fact dispute. (Opp. 2, 8, 10.) There is no doubt, however, that the existence of the factual dispute found by the Fourth Circuit traces directly to the two erroneous principles of law it enunciated. The requirement that each challenged price have been offered to meet an individual competitor's available price led directly to the conclusion that fact issues remain even when, as here, a discount pricing schedule was indisputably adopted to meet documented market conditions and maintained over time by monitoring changes in the availability and pricing of competitive products. (Pet. App. 9a-10a.) And under the Fourth Circuit's view that a defendant's burden to prove its good faith intent to meet competition virtually forecloses the granting of summary judgment—presumably because "issues of credibility are beyond a judge's ken" (Pet. App. 8a)—there

will be a factual issue concerning intent even absent any countervailing evidence.

The meeting competition defense, however, while focused on the seller's good faith belief, really is anchored in "the existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price would meet the equally low price of a competitor[,]" *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 451 (1983), and should not be subject to any special summary judgment rule. The Fourth Circuit's decision, because it is one of a handful of appellate court decisions defining the scope and nature of the meeting competition defense, thus threatens to dampen substantially the competitive vigor of sellers who will justifiably fear that any departure from their basic prices will subject them to lengthy and costly litigation, leading inevitably to a trial, and with the attendant exposure to treble damages.

Hoover claims that Bayer "omitted" the allegedly material facts upon which the Fourth Circuit focused in identifying a claimed fact dispute, although Hoover's own discussion of those claimed facts consists of little more than a series of quotations from the Fourth Circuit's opinion. (Opp. 4-8.) Hoover's assertion, moreover, is incorrect. Bayer discussed those claimed facts in its Statement of the Case and in its analysis of the Fourth Circuit's errors. (Pet. 7-9, 16 n.6.) That discussion demonstrates that the Fourth Circuit's claimed fact disputes have only the remotest relevance to the central question—for which there is ample affirmative evidence—of whether Bayer structured the discount levels in its discount price schedule to respond to competitive offers available to its other distributors.

Hoover tries but fails to reconcile the Fourth Circuit's analysis with this Court's decision in *Falls City*. While pointing out that the Fourth Circuit relied upon *Falls City* (Opp. 2), Hoover's own defense exposes the Fourth Circuit's erroneous understanding of that case. Thus, even though

Hoover acknowledges the *Falls City* principle that "'Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions'" (Opp. 11), Hoover asserts that the principle does not apply here because Falls City, unlike Bayer "was a small firm without the ability or resources to price on a customer-by-customer basis." (Opp. 12.) Nothing in *Falls City* supports that distinction, which limits this Court's *Falls City* holding in a drastic and surprising way. Indeed, such a defense of the Fourth Circuit's decision is incompatible with this Court's efforts in *Falls City* to dispense with formalistic objections to the application of the meeting competition defense. Here, by requiring Bayer to show based on the undisputed evidence that each of Bayer's challenged prices "matched" specific competitive offers, the Fourth Circuit imposed a burden that will make it difficult or impossible for sellers in the future to design procompetitive tools, such as volume discount schedules in long-term contracts, to respond to prices that are "generally available from [the seller's] competitors." *Falls City*, 460 U.S. at 451.

Bayer also demonstrated in its petition that the Fourth Circuit's decision conflicted with decisions in other circuits, including *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966), which construed Section 2(b) to encompass volume discount schedules created and maintained in a good faith effort to meet competitive conditions. (Pet. 13-15.) Hoover, in response, ignores the reasoning of those cases and reduces each to the simple question of whether the court found "disputed facts." (Opp. 14-16.) That approach, however, does not change the fact that numerous courts have recognized that Section 2(b) is not limited to competitive prices that are set one customer or transaction at a time.

Hoover similarly ignores the conflict between the circuits concerning the standard for granting summary judgment under Section 2(b), once again retreating to the argument that this case simply rests on the existence of a disputed issue of fact.

(Opp. 16-18.) Again, however, the Fourth Circuit's approach is markedly impacted by its stated view that there are nearly always fact disputes when intent is concerned. By applying that erroneous view to the facts in this case, the Fourth Circuit swept aside as legally insufficient the undisputed evidence regarding the threat that Bayer faced because of the availability of lower priced alternatives to its other distributors—including the concessions by Hoover's own principals that Bayer lowered its prices to its other two distributors in response to those competitive threats. (Pet. 16-17 & n.7.) That was more than sufficient to demonstrate a good faith intent to meet competition, under the "'flexible and pragmatic, not technical or doctrinaire, concept'" of good faith that "lies at the core of the . . . defense." *United States v. United States Gypsum Co.*, 438 U.S. 422, 454 (1978). The Fourth Circuit's decision thus flies in the face of this Court's clear holding that a seller must show "'a good faith belief, rather than an absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor.'" *Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 82 (1979) (quoting *United States Gypsum Co.*, 438 U.S. at 453).

Just as it ignores the legal principles underlying the Fourth Circuit ruling, Hoover also fails to address the likely consequences if the Fourth Circuit's decision is allowed to stand as an authoritative statement of law. At one level, unnecessary trials will result when courts deny summary judgment in cases in which all the evidence and common sense supports the defense even though issues of intent may theoretically remain unresolved.

More fundamentally, by making summary judgment generally unavailable in meeting competition cases and by drastically narrowing the defense in a way that makes questionable its application to price schedules in general, the Fourth Circuit's decision can be expected to inhibit sellers when faced with the question of whether to discount their

prices in response to competitive threats in the marketplace. There has always been a tension between the policies of the Robinson-Patman Act and the primary thrust of the antitrust laws to encourage free and open competition. As a result, as this Court has recognized,

> Recognition of the right of a seller to meet a lower competitive price in good faith may be the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between sellers.

Great Atlantic & Pacific Tea Co., 440 U.S. at 83 n.16. The Fourth Circuit's decision exacerbates that tension because it runs directly counter to this Court's generous reading of the meeting competition defense, and thus undermines the pro-competitive goals of the antitrust laws. It confronts business decision makers with a different set of risks that weigh heavily against discount pricing schedules to meet known competitive conditions, and may lead many sellers to conclude that the protections of the defense are more illusory than real.

"Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951). The Fourth Circuit's approach, however, will have just that effect, and will make it difficult for sellers to design discount pricing schedules to respond to competitive pressures in the marketplace.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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